87-1286

No.___

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,

Petitioners,

v.

FREDERICK R. CALLOWHILL,

Respondent,

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,

Petitioners,

v.

WALTER J. SMALL,

Respondent,

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,

Petitioners,

v.

WILLIAM F. MARTIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

JUDITH E. HARRIS, ESQUIRE*
MICHELE D. BROWN, ESQUIRE
Attorneys for Petitioners

Of Counsel:

HARRIS AND KAHN
1600 MARKET STREET, SUITE 1416
PHILADELPHIA, PA 19103
(215) 568-4202

**Attorney of Record*

PACKARD PRES... ...0

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QUESTIONS PRESENTED

1. Should the statute of limitations for filing a civil action be tolled because an employer failed to post the notice required by 29 U.S.C. §627?

2. If the statute of limitations for filing a civil action should not be tolled because an employer failed to post the notice required by 29 U.S.C. §627, should the statute of limitations be tolled because of constructive notice?

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WILLIAM F. MARTIN,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, The Allen-Sherman-Hoff Company, Inc., and Ecolaire Incorporated, pray that a writ of certiorari be issued to review the November 4, 1987, judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 832 F.2d 269 (3d Cir. 1987). The relevant decisions of the district courts have not been published.

JURISDICTION

The judgment of the Court of Appeals was entered on November 4, 1987. On December 10, 1987, the Court of Appeals stayed issuance of the mandate until February 2, 1988. This petition is being filed within 90 days of the entry of judgment.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves the following statutes and regulations:

Title 29, United States Code, Labor

§255. Statute of limitations

Any action commenced on or after May 14, 1947, to enforce any cause of action for unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended [29 U.S.C. §201 *et seq.*], the Walsh-Healey Act [41 U.S.C. §35 *et seq.*], or the Bacon-Davis Act [40 U.S.C. §276a *et seq.*]-

> (a) if the cause of action accrues on or after May 14, 1947-may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued. . . .

§626 Recordkeeping, Investigation, and Enforcement

> (d) No civil action may be commenced by an individual under this section until 60 days after a charge alleging

unlawful discrimination has been filed with the Equal Employment Opportunity Commission. Such a charge shall be filed-

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(d) of this title applies, within 30 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier. . . .

(e)(1) Section 255 . . . of this title shall apply to actions under this chapter. . . .

§627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Equal Employment Opportunity Commission setting forth information as the Commission deems appropriate to effectuate the purposes of this Act.

Title 29, Code of Federal Regulations, Equal Employment Opportunity Commission

§1626.9 Referral to and from State agencies; referral States

(a) The Commission may refer all charges to any appropriate State agency and will encourage State agencies to refer charges to the Commission in order to assure that the prerequisites for private law suits, as set out in section 14(b) of the Act [29 U.S.C. §633], are met. Charges so referred shall be deemed to have been filed with the Commission in accordance with the specifications contained in §1626.7(b) [timeliness of charge]. The Commission may process any charge at any time, notwithstanding provisions for referral to and from appropriate State agencies.

(b) States to which all ADEA charges may be referred: . . . Pennsylvania. . . .

§1626.10 Agreements with State or local fair employment practices agencies

(a) Pursuant to sections 6 and 7 of the ADEA [29 U.S.C. §§625 and 626] and section 11(b) of the FLSA [29 U.S.C. §211], the Commission may enter into agreements with state or local fair employment practices agencies to cooperate in enforcement, technical assistance, research, or public informational activities, and may engage the services of such agencies in processing charges assuring the safeguard of the federal rights of aggrieved persons.

(b) The Commission may enter into agreements with state or local agencies which authorize such agencies to receive charges and complaints pursuant to §1626.5 [where to submit complaints and charges] and in accordance with the specifications contained in §§1626.7 [timeliness of charge] and 1626.8 [contents of charge; amendment of charge].

(c) When a worksharing agreement with a State agency is in effect, the State agency will act on certain charges and the Commission will promptly process charges which the State agency does not pursue. Charges received by one agency under the agreement shall be deemed received by the other agency for purposes of §1626.7 [timeliness of charge].

STATEMENT OF THE CASE

I. PROCEDURAL BACKGROUND

On December 9, 1987, respondents Frederick R. Callowhill, Walter J. Small, and William F. Martin each filed a complaint in the United States District Court for the Eastern District of Pennsylvania alleging that his former employer, petitioners The Allen-Sherman-Hoff Company, and its parent corporation, Ecolaire Incorporated, had violated his rights as secured by the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. §621 *et seq*. The jurisdiction of the district

court was invoked under Sections 626(b), 626(c), 216(b) and 217 of Title 29 of the United States Code.

Allen-Sherman-Hoff experienced severe economic problems in 1982 and 1983. In an effort to reduce costs, Allen-Sherman-Hoff decided to reduce personnel. In 1982, it laid off approximately 56 employees. In 1983, approximately 84 employees, including the present respondents, were laid off. From January 1, 1982, until January 1, 1986, the workforce at Allen-Sherman-Hoff was reduced by 56.4 percent.

Frederick R. Callowhill, who was born on November 7, 1921, was employed by Allen-Sherman-Hoff in June, 1979, as Sales Manager in the International Operations Group, a position he held until his layoff on December 9, 1983. Mr. Callowhill was notified in mid-November, 1983, of the layoff. In an employment discrimination case a cause of action accrues when the employee receives notification of the employment action which he believes is motivated by unlawful discrimination. *Delaware State College v. Ricks*, 449 U.S. 250 (1980). Mr. Callowhill's cause of action accrued, therefore, in mid-November, 1983. Mr. Callowhill filed a charge of age discrimination with the Equal Employment Opportunity Commission ("EEOC") on October 8, 1985.

Walter J. Small, who was born on February 9, 1922, was employed by Allen-Sherman-Hoff in January, 1948. He worked as Manager of the Renewal Parts Department from January, 1974, until his layoff on December 9, 1983. He was notified in mid-November, 1983, of the layoff. Under *Delaware State, supra*, his cause of action accrued at that time. Mr. Small filed a charge of age discrimination with the EEOC on October 11, 1985.

William F. Martin, who was born on June 14, 1920, was first employed on May 28, 1941, by Baldwin/Lima/Hamilton, a company which was acquired by Allen-Sherman-Hoff in 1976. He was employed as a Pricing Specialist in the Renewal Parts Department from 1981 until his layoff on December 9, 1983. He was notified in mid-November, 1983, of the layoff. Under *Delaware State, supra*, his cause of action accrued at that time.

Mr. Martin filed a charge of age discrimination with the EEOC on October 15, 1985.

On December 9, 1985, each respondent filed the instant suits in the United States District Court for the Eastern District of Pennsylvania. All three cases were assigned originally to the Honorable Joseph S. Lord, III. Defendants moved in each suit to dismiss the complaint pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure ("Motions to Dismiss"). Defendants argued that plaintiffs' claims pursuant to the ADEA were barred by their failure to file timely administrative charges with the EEOC, as required by 29 U.S.C. §626(d). Section 626(d) requires, as a prerequisite to a civil action, that administrative charges be filed within 180 days of the alleged unlawful practice. In a state such as Pennsylvania which has a local agency charged with enforcing state statutes protecting individuals against age discrimination, the time for filing a charge with the EEOC is extended to 300 days, or within 30 days of plaintiff's receipt of notice that the state law proceedings have terminated, whichever is earlier. 29 U.S.C. §626(d).

In response to defendants' Motions to Dismiss, each plaintiff submitted an affidavit stating that while employed by Allen-Sherman-Hoff, he was not aware of his rights under federal and state employment discrimination laws or the ADEA specifically. Also, each stated that he did not observe any posted notices from the U.S. Department of Labor or the EEOC advising of these rights nor were any such notices posted.

In reply, defendants submitted the affidavit of Martha J. Mitri, a member of the Human Resources Department of Allen-Sherman-Hoff since March, 1980, and Manager of the department since June, 1984. Based on her personal knowledge, Ms. Mitri testified that, since March, 1980, the Pennsylvania Human Relations Commission ("PHRC") notice was posted in locked, glass-enclosed bulletin boards in the hallway outside of the Executive and Human Resources offices, inside the employee cafeteria, and immediately inside the employee entrance from the parking lot. The poster states that it is unlawful, pursuant to the Pennsylvania Human Relations Act, for an employer, on the basis of race, color, religion, ancestry, age,

sex, national origin, non-job related handicap or disability, to discriminate in employment. The poster also explains that the purpose of the Pennsylvania Human Relations Act is to prevent and eliminate unlawful discrimination, and that an individual who believes he or she has experienced discrimination may file a complaint with the PHRC. The poster supplies the addresses of the various PHRC offices where complaints may be filed and information obtained.

Plaintiffs' affidavits do not contradict Ms. Mitri's affidavit asserting that PHRC notices were posted. Plaintiffs' affidavits state only that they did not observe any Department of Labor or EEOC notices posted. As a matter of law, the facts in Ms. Mitri's affidavit are undisputed and, therefore, are taken as true. *See Hall v. Ametek, Inc.*, ____ F. Supp. ____, 45 FEP Cases (BNA) 742, 744 (E.D. Pa. 1987) ("In order to create a genuine issue of fact whether notices were posted where defendant has submitted affidavits that the posting occurred, plaintiff must actually testify that he observed the bulletin boards and the notices were not there.")

Because of the inclusion of the affidavits, the Court treated the Motions to Dismiss as ones for summary judgment. The Courts denied the Motions to Dismiss ruling that the time for filing the administrative charge should be tolled because of the failure to post the EEOC notice.

After the close of discovery, defendants filed motions for summary judgment ("Motions for Summary Judgment") on the ground that the actions were barred by the two-year statute of limitations set forth in the Portal-to-Portal Act, 29 U.S.C. §255, as incorporated into the ADEA, 29 U.S.C. §626(e). The motions also argued that, based on *Dreyer v. Arco Chem. Co.*, 801 F.2d 651 (3d Cir. 1986), *cert. denied*, 107 S. Ct. 1348 (1987), plaintiffs would not be able to prove willfulness on the part of the defendants. The three-year statute of limitations, therefore, would not apply. By this time, the *Callowhill* matter had been reassigned to the Honorable Edmund V. Ludwig, and the *Small* and *Martin* matters remained before Judge Lord.

Judge Ludwig granted defendants' Motion for Summary Judgment and dismissed Mr. Callowhill's complaint. The Court

found that the action was barred by the two-year statute of limitations. Also, the Court found that the record did not present a sufficient issue of willfulness to invoke the three-year statute of limitations.

Judge Lord also granted defendants' Motion for Summary Judgment in *Small* and *Martin*. First, the Court found that, because plaintiffs had failed to raise a genuine issue of material fact on the question of willfulness, the two-year statute of limitations was applicable. Second, the Court, relying upon *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986), *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483 (11th Cir. 1984), and *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983), held that defendant Allen-Sherman-Hoff's failure to post the EEOC notice did not toll the two-year statute of limitations for filing a civil action. Finally, the Court concluded that there was no evidence to support plaintiffs' allegation that defendants concealed facts and thus misled plaintiffs, or prevented them from asserting their rights.

Plaintiff appealed the entries of summary judgment to the United States Court of Appeals for the Third Circuit. The Third Circuit concluded that the district court was correct in denying defendants' Motions to Dismiss, but held that the Motions for Summary Judgment should have been denied. The Court concluded that the two-year statute of limitations should be tolled and the complaint considered timely filed.

II. FACTUAL BACKGROUND

Mr. Callowhill first learned that his employment at Allen-Sherman-Hoff would be terminated three weeks prior to December 9, 1983. He met with Brian Ennis, Vice President of Sales, who gave him notice of dismissal and told him that Michael Marlin and Ted Moore would be doing his work. During the period between his notice and his actual termination, Mr. Callowhill had discussions with Mr. Small, who had also received notification of his layoff. Mr. Callowhill remembered that they spoke about "how raw a deal it was [they] were

getting." Mr. Callowhill also had several conversations with his supervisor, Ted Moore, during which Mr. Callowhill expressed his view that his discharge was unfair.

Mr. Callowhill met with Joseph Long, the President of Allen-Sherman-Hoff, to discuss the termination of his employment. Mr. Long told Mr. Callowhill that the reason for his dismissal was not his job performance. After this meeting, on November 22, 1983, Mr. Callowhill wrote Mr. Long a memorandum listing his accomplishments and asking for a better severance compensation package from Allen-Sherman-Hoff. Mr. Long never responded to this memorandum. At their meeting, Mr. Long had also offered Mr. Callowhill the possibility of a consulting arrangement with defendants, but Mr. Callowhill did not inquire further about it.

During the course of Mr. Callowhill's deposition he was questioned regarding when he first believed defendant had discriminated against him. When defense counsel asked Mr. Callowhill at his deposition at what point he first became "keenly aware" that he had been discriminated against on the basis of his age, he responded:

> Shortly thereafter, after reflecting on why I was discharged in relationship to my performance with the company.

In the context of his testimony, it is clear that "shortly thereafter" in the quotation above referred to shortly after he received notice of dismissal in mid-November, 1983.

The following colloquy occurred between Mr. Callowhill and defense counsel at Mr. Callowhill's deposition:

> Question: In December of 1983, on the day you were discharged, did you believe that you were discriminated against because of your age in your discharge?
>
> * * *
>
> Answer: I think I can truthfully say that I had suspicions. But it wasn't foremost in my mind at that particular day.

Mr. Callowhill did not seek the advice of counsel regarding his claim of age discrimination until October 1985 although he

testified that "[t]he thought had crossed my mind that [filing charges with federal and state agencies] . . . was available to me."

Mr. Callowhill filed a complaint with the PHRC and a complaint in the United States District Court for the Eastern District of Pennsylvania on December 9, 1985, over two years after his notice of termination.

Mr. Callowhill, in an affidavit submitted in response to the Motion to Dismiss, stated that during his period of employment with defendants he "was at no time, aware of or advised of the existence of or his legal rights under federal and state employment discrimination statutes and specifically the Age Discrimination in Employment Act."

Martha J. Mitri, Manager of Human Resources for defendants, stated in an undisputed affidavit submitted in connection with Defendants' Motion to Dismiss that defendants posted notices issued by the PHRC "at all times since March, 1980," and thereafter in three locations at the company.

During the deposition of Mr. Small, he stated the following with regard to his thoughts at the time of his termination:

> A. I just had a feeling in my mind that perhaps, you know, it could have affected my choice in being terminated at that time.
>
> Q. Perhaps what could have affected your choice?
>
> A. My age.

Mr. Martin testified at his deposition that he did not think age was a factor in his layoff until he spoke with Mr. Small in September, 1985.

Mr. Small and Mr. Martin filed complaints in the United States District Court for the Eastern District of Pennsylvania on December 9, 1985, over two years after each was notified of his termination.

Mr. Small and Mr. Martin each submitted affidavits, similar to Mr. Callowhill's, stating that during his period of employment with defendants he "was at no time, aware of or advised of the

existence of or his legal rights under federal and state employment discrimination statutes and specifically the Age Discrimination in Employment Act."

Ms. Mitri's undisputed affidavit, submitted in the *Callowhill* matter, was submitted in support of defendants' Motions to Dismiss filed in the *Small* and *Martin* matters.

REASONS FOR GRANTING THE WRIT

Among the many important cases competing for this Court's attention, this case stands out in its significance to the administration of civil justice in the federal court system for the reasons that follow.

I. THE COURT SHOULD REVIEW THIS CASE TO RESOLVE THE INTERCIRCUIT CONFLICT REGARDING TOLLING OF THE STATUTE OF LIMITATIONS FOR FILING A CIVIL ACTION FOR THE FAILURE TO POST THE NOTICE REQUIRED BY 29 U.S.C. SECTION 627.

In reversing the grant of summary judgment in favor of defendants on plaintiffs' legal claims, the Court of Appeals concluded that defendants' failure to post the notices required by 29 U.S.C. §627 "toll[ed] the running of the period for filing the administrative charge." (A-7). In addition, the Court of Appeals held that the statute of limitations for filing a civil action should also be tolled. (A-8-9).

This holding directly conflicts with that of the United States Court of Appeals for the Eleventh Circuit in *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983), and *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483 (11th Cir. 1984), and the United States Court of Appeals for the Eighth Circuit in *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986). The Eleventh Circuit wrote in *Kazanzas, supra*:

> We conclude that the factors [(Disney's failure to post a notice as required by 29 U.S.C. §627)] which led the district court to equitably modify the 180 day provision [for

> filing an administrative charge] do not mandate the tolling of the statute of limitations. . . .

704 F.2d at 1530.

To modify the two year period would contravene the normal rule that "[i]gnorance of . . . legal rights or failure to seek legal advice, [does] not toll the statute." *Id.* (quoting *Quina v. Owens-Corning Fiberglas Corp.*, 575 F.2d 1115, 1118 (5th Cir. 1978) and *Howard v. Sun Oil Co.*, 404 F.2d 596, 601 (5th Cir. 1968)). As the *Kazanzas* court points out, "[i]t is too late in the day to urge the [ADEA] statute's 'newness.'" *Id.* (quoting *Edwards v. Kaiser Aluminum & Chem. Sales, Inc.*, 515 F.2d 1195, 1200 (5th Cir. 1968)).[1] The *Kazanzas* district court was of the view that barring Kazanzas' claim because of his failure to comply with the 180-day requirement when Disney failed to post the notice "would place a duty to comply upon the employer without penalty for breach and would grant to the employee a right to be informed without redress for violation." 518 F. Supp. 292, 294 (M.D. Fla. 1981) (quoting *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978)). The Eleventh Circuit concluded,

> That rationale has little force for the two year period when the approved notice does not even mention the two year statute of limitations.

In *McClinton v. Alabama By-Products Corp.*, *supra*, the Eleventh Circuit stated,

> Although the failure of the employer to display the poster may toll the 180-day notification period, it will *not* normally toll the two-year statute of limitations for bringing the action in court, which continues to run from the date of the alleged wrongful act. *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527 (11th Cir.), *cert. denied*, __U.S. __, 104 S.

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1. The *Edwards* court's view is significant since it was reached almost ten years ago. If it was too late then to rely upon ignorance of the statute as a result of its newness, it certainly is too late to rely upon it now, 20 years after the ADEA was enacted.

> Ct. 425, 78 L.Ed.2d 360 (1983). Thus, even if the notification period is tolled, an employee will usually be absolutely barred from filing suit after two years.

743 F.2d at 1486 n.5 (emphasis in original).

In addition, the Fifth Circuit wrote in *DeBrunner v. Midway Equip. Co., supra,*

> Although the failure of the employer to post notice may toll the 180-day filing period, it will not normally toll the two-year statute of limitations for bringing the action in court, which continues to run from the date of the alleged wrongful act. *Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1530 (11th Cir. 1983), *cert. denied*, 464 U.S. 982, 104 S.Ct. 425, 78 L.Ed.2d 360 (1983).

803 F.2d at 952 n.5.

The Court should grant review in order to resolve the direct conflict between the Third Circuit and two other Courts of Appeals on the important question of whether the statute of limitations for the filing of a civil action should be tolled because the employer failed to post the notice required by 29 U.S.C. §627. The analysis and holding regarding this issue by the Eleventh Circuit in *Kazanzas, supra,* is correct while that by the Third Circuit in these cases is not.

In *Kazanzas*, the plaintiff, when he was discharged, was "generally aware of a right not to be discriminated against on the basis of age and of facts which would reasonably lead the plaintiff to conclude that his discharge was based on age." 704 F.2d at 1530. (quoting *Kazanzas v. Walt Disney World Co.*, 518 F. Supp. at 293). Even though he had this knowledge, the plaintiff did not consult an attorney until over two years after his discharge. The Eleventh Circuit concluded that these factors, namely, ignorance of legal rights or the failure to seek legal advice, did not mandate the tolling of the statute of limitations.

As demonstrated above, Mr. Callowhill and Mr. Small thought at the time of their layoffs that age had been a factor in their layoffs. Neither Mr. Callowhill nor Mr. Small sought an attorney, however, until October, 1985, almost two years after

their layoffs on December 9, 1983. Mr. Martin testified at his deposition that it was not until he spoke with Mr. Small in September, 1985, that he thought age was a factor in his layoff. Because Mr. Callowhill and Mr. Small were generally aware at the time of their layoffs of the right not to be discriminated against on the basis of age, as discussed in *Kazanzas*, *supra*, tolling of the statute of limitations on their claims is not warranted.

Tolling is not warranted in any of these cases because, as evidenced by Martha Mitri's uncontradicted affidavit discussed above, Allen-Sherman-Hoff had PHRC notices posted since March, 1980. The posting of the PHRC notice is significant not only because it provided notice of Pennsylvania law prohibiting age discrimination in employment, but also because it provided a means of entry into the federal anti-discrimination process. Had the individuals contacted any of the PHRC offices listed on the poster, they would have been informed of the EEOC and the ADEA. The reason is that 29 C.F.R. §1626.9(a) provides that the EEOC will encourage state agencies to refer charges to the EEOC. In addition, the PHRC and the EEOC have a worksharing agreement, which was in effect at all times material hereto, pursuant to 29 C.F.R. §1626.10. Section 1626.10 provides for cooperation in, among other things, enforcement and public information, and the safeguarding of federal rights of aggrieved persons. Posting of the PHRC notice, although it does not mention the ADEA, provided the means to lead respondents to information about the EEOC and the ADEA.

For these reasons, the Third Circuit should have reached the same conclusion as the Eleventh Circuit reached, namely, that tolling of the statute of limitations was not warranted.

II. THE COURT SHOULD REVIEW THESE CASES TO RESOLVE THE INTERCIRCUIT CONFLICT ON WHETHER CONSTRUCTIVE NOTICE, WHICH WAS PROVIDED IN THESE CASES THROUGH THE POSTING OF THE PENNSYLVANIA HUMAN RELATIONS COMMISSION NOTICE EXPLAINING THE RIGHT NOT TO BE DISCRIMINATED AGAINST ON THE BASIS OF AGE, WILL TOLL THE STATUTE OF LIMITATIONS.

As discussed above, in an undisputed affidavit, Martha Mitri testified that, since 1980, Allen-Sherman-Hoff had posted PHRC notices explaining that discrimination based on age is against the law in Pennsylvania, and that an individual who believes he or she has been discriminated against may file a complaint with the PHRC. The Third Circuit acknowledged that the PHRC notices were posted, but said that the plaintiffs claimed not to have seen them. (A-4). *See Hall v. Ametek, Inc., supra.*

No circuit has stated that the ADEA requires an employer to do more than post the EEOC notice where it can be readily observed by its employees. In *DeBrunner, supra*, the Eighth Circuit stated that the failure to post the notice did not warrant tolling the administrative statute of limitations if an employee has general knowledge of his or her right not to be discriminated against on the basis of age or the means of acquiring that knowledge. 803 F.2d at 952.

The First Circuit stated in *Earnhardt v. Commonwealth of Puerto Rico*, 691 F.2d 69 (1st Cir. 1982), that tolling is not appropriate where the employee has actual knowledge of the ADEA complaint procedures or constructive knowledge of the procedures.

In *Smith v. American President Lines*, 571 F.2d 102 (2d Cir. 1978), the Second Circuit stated that the employer's failure to post the §627 notice did not necessarily mean that the employee was prevented from learning of the EEOC's existence or the benefits of its administrative procedures. Access to the means of acquiring knowledge of one's rights, which in the

Smith case, *supra*, was a result of his representation by an attorney in proceedings before the state agency charged with enforcing discrimination laws, precluded the tolling of the administrative statute of limitations. The Fifth Circuit enunciated the same standard in *Pruet Prod. Co. v. Ayles*, 784 F.2d 1275 (5th Cir. 1986), and in *Cruce v. Bruzosport School Dist.*, 703 F.2d 862 (5th Cir. 1983).

The Eleventh Circuit in *McClinton*, *supra*, held that, although the failure to post a §627 notice will toll the running of the administrative statute of limitations until the employee has actual knowledge of his rights or retains an attorney, tolling is not appropriate if the employee has general knowledge of his or her right not to be discriminated against or the means of acquiring the knowledge. 743 F.2d at 1486.

Because Allen-Sherman-Hoff had the PHRC notices posted, the means were present by which plaintiffs could learn of their rights not to be discriminated against on the basis of age, of the existence of the EEOC, and of EEOC's administrative procedures. Once plaintiffs contacted the PHRC as the posted notice advised, they would have begun not only the state administrative process but also the federal process. As discussed above, 29 C.F.R. §1626.9(a) provides that the EEOC will encourage state agencies to refer charges to the EEOC. In addition, the PHRC and the EEOC have a worksharing agreement, which was in effect at all times material hereto, pursuant to 29 C.F.R. §1626.10. Section 1626.10 provides for cooperation in, among other things, enforcement and public information, and the safeguarding of federal rights of aggrieved persons.

In upholding the district court's denial of defendants' Motions to Dismiss, the Third Circuit concluded that the district court's ruling that the failure to post the §627 notices tolled the administrative statute of limitations was correct. As a result, the Third Circuit is in conflict with the First, Second, Fifth and Eleventh Circuits in the cases discussed above in which the courts stated that tolling is not warranted if the means of acquiring knowledge of one's rights is available to the employee.

To the extent the Third Circuit relied upon the district court's citation of *Bonham v. Dresser Indus., Inc.*, *supra*, its

decision is also in error. In *Bonham*, there was no evidence that any notices, either EEOC or PHRC, were posted. There were no means, therefore, of acquiring knowledge of the right not to be discriminated against.

This Court should grant this petition for writ of certiorari in order to resolve the conflict among the Circuits on what circumstances justify the tolling of the ADEA administrative statute of limitations, and to determine whether the Third Circuit erred in affirming the district court's denial of petitioners' Motions to Dismiss. A resolution of the conflict among the Circuits would resolve uncertainty and reduce litigation over this issue.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

[s/] Judith E. Harris

January 29, 1988
DATED

JUDITH E. HARRIS, ESQUIRE
MICHELE D. BROWN, ESQUIRE
Attorneys for Petitioners,
Allen-Sherman-Hoff Company,
Inc. and Ecolaire, Inc.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1034, 87-1169 and 87-1170

FREDERICK R. CALLOWHILL,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INC.

WALTER J. SMALL,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INCORPORATED

WILLIAM F. MARTIN,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INCORPORATED

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civ. Nos. 85-7081, 85-7077 and 85-7080)

Argued October 1, 1987

BEFORE: SEITZ, GREENBERG and HUNTER,
Circuit Judges

(Filed November 4, 1987)

RALPH B. D'ORIO
GARY C. BENDER (Argued)
CRAMP, D'IORIO, McCONCHIE & FORBES
215 N. Olive Street
P.O. Box 568
Media, Pa. 19063

Attorneys for Appellants

JUDITH E. HARRIS (Argued)
HARRIS & KAHN
1600 Market Street
Suite 1416
Philadelphia, Pa. 19103

Attorneys for Allen-Sherman-Hoff Company, Inc. and Ecolaire, Incorporated

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

Plaintiffs Frederick R. Callowhill, Walter J. Small, and William F. Martin appeal from summary judgments entered in the district court in favor of defendants Allen-Sherman-Hoff Company, Inc. and Ecolaire, Inc., dismissing their separate complaints under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§621-634. The grounds for granting the motions were that the cases are barred by the statute of limitations under the ADEA which requires that cases be filed within two years of the accrual of a cause of action, or three years if the violations are willful. 29 U.S.C. §626(e)(1); 29 U.S.C. §255(a). Plaintiffs alleged that they were discharged by their employer, Allen-Sherman-Hoff, because of age. Ecolaire was joined as a defendant because Allen-Sherman-Hoff is one of its

divisions. It is undisputed that each plaintiff was advised on or about November 18, 1983 that his last day of work would be December 9, 1983 and that none worked for Allen-Sherman-Hoff after the latter date.

We separately set forth additional material facts developed in each case on the motions for summary judgment. Callowhill, who was born November 7, 1921, was employed by Allen-Sherman-Hoff on June 8, 1979 as a manager of the International Operations Group responsible for all sales activities in the United States and Canada. He was told that he was being discharged because of a departmental reorganization. While Callowhill had "suspicions" that his discharge was because of age, it was not until almost two years later, when he talked to other former employees of Allen-Sherman-Hoff, that he concluded the corporation had discriminated against older employees. Accordingly, he consulted an attorney on or about October 4, 1985 and on October 8, 1985 filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) in Philadelphia. Notice of the charge was served on Allen-Sherman-Hoff on October 30, 1985 and on December 9, 1985 Callowhill brought this action in the district court.

Small, who was born on February 9, 1922, joined Allen-Sherman-Hoff in January 1948 and in early January 1974 became manager of its renewal parts department. The company advised him that his discharge was necessary because of economic reasons. While Small subsequently wondered whether the introduction of a new pension plan made it advantageous for Allen-Sherman-Hoff to discharge him because of his age, he did not consult an attorney until after he was told in September 1985 that older employees had been terminated by Allen-Sherman-Hoff even though there was work for them. He consulted an attorney on or about October 4, 1984 and on October 11, 1985 filed a Charge of Discrimination with the EEOC. Notice of the charge was served on Allen-Sherman-Hoff on October 31, 1985 and on December 9, 1985 Small brought this action in the district court.

Martin, who was born on June 14, 1920, was hired by a predecessor corporation to Allen-Sherman-Hoff in 1941 as a

payroll clerk. He began working for Allen-Sherman-Hoff in 1976 as a sales correspondent and in 1981 was given the added responsibility of being a pricing specialist. Martin was told he was being discharged because of a departmental reorganization and economic conditions. It was not until he had a discussion with Small in September 1985 that he considered his age might have been a factor in the decision to terminate him. On or about October 4, 1985 he consulted with counsel and he filed a Charge of Discrimination with the EEOC on October 15, 1985. Notice of the charge was served on Allen-Sherman-Hoff on October 30, 1985 and December 9, 1985 Martin brought this action in the district court.

It is undisputed from the records before us that Allen-Sherman-Hoff never posted the notice required by 29 U.S.C. §627 to advise its employees of their rights under the ADEA. It appears, however, though plaintiffs claim not to have seen them, that it posted notices from the Pennsylvania Human Relations Commission dealing with employees' rights under Pennsylvania anti-discrimination laws and that at about the time plaintiffs commenced their actions in the district court, they also filed complaints with the Pennsylvania Commission.

Prior to moving for summary judgment, defendants filed, in all three cases, motions to dismiss the complaints for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Defendants asserted that the actions were barred by plaintiff's failure to file timely administrative charges with the EEOC under 29 U.S.C. §626(d) which requires, as a prerequisite to a district action, that administrative charges be filed within 180 days after the occurrence of an alleged unlawful practice. In a state such as Pennsylvania which has an agency performing functions similar to those of the EEOC, the time for filing is extended to 300 days or to a period within 30 days of receipt by the individual of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. §626(d). In view of the circumstance that affidavits submitted by the parties on these initial motions were considered by the district court the Rule 12(b)(6) motions were treated as motions for summary judgment. Nevertheless we will

continue to refer to them as motions to dismiss so as to distinguish them from the later motions.

The motions to dismiss were argued simultaneously before the district court which denied them on the authority of our opinion in *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978). The *Bonham* case held that the employer's failure to post the notice required by 29 U.S.C. §627 will result in tolling the running of the limitations period in the EEOC proceedings, at least until such time as the aggrieved person seeks out an attorney or acquires actual notice of his rights under the ADEA, 569 F.2d at 193.

Subsequent to the completion of discovery, defendants moved for summary judgment. In *Callowhill* they alleged that the action was barred by the two-year statute of limitations in 29 U.S.C. §626(e)(1) and 29 U.S.C. §255(a) and that the evidence in the record, as a matter of law, could not support a charge of age discrimination. In *Small* and *Martin* the motions for summary judgment were based solely on the statute of limitations.[1] In *Callowhill* the district judge, in an oral opinion, ruled that the evidence was insufficient to support a finding of willfulness and thus the two-year statute of limitations applied. The judge then held that the claim was untimely and, accordingly, he granted summary judgment and dismissed the action. He indicated, however, that he was not "prepared to rule on this record that there is no issue of age discrimination, or to grant summary judgment on that basis." On December 15, 1986, the judge entered an order reflecting this decision.

In the *Small* and *Martin* cases a different judge filed a single written opinion on defendants' motions.[2] He held that plaintiffs had failed to raise a genuine issue of material fact with respect to Allen-Sherman-Hoff's alleged willful statutory violation of the ADEA and, as a result, the two-year statute of limitations applied. The judge then held that notwithstanding Allen-Sherman-Hoff's failure to post the required notice of

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1. Defendants also unsuccessfully renewed their motions to dismiss.

2. The judge in the *Small* and *Martin* cases was the same judge who denied defendants' three motions to dismiss.

employee's rights under 29 U.S.C. §627, the two-year statute of limitations for the court action, as distinguished from the shorter administrative statute of limitations, would not be tolled nor would it be tolled because of Allen-Sherman-Hoff's alleged misrepresentation as to why plaintiffs were discharged. On February 25, 1987, the judge entered an order reflecting this decision. Small and Martin appealed from this order and Callowhill appealed from the order of December 15, 1986.

Plaintiffs contend that the two-year statute of limitations should be tolled by reason of the failure of Allen-Sherman-Hoff to post the notice required by 29 U.S.C. §627. They further assert that they are entitled to the tolling inasmuch as they were barred by 29 U.S.C. §626(d) from filing their district court complaints until 60 days after they filed their administrative charges with the EEOC and thus could not bring their district court actions within the two years allowed. Alternatively, plaintiffs argue that the district court erred in finding as a matter of law that Allen-Sherman-Hoff's conduct could not be a willful violation of the ADEA. Defendants, in addition to controverting plaintiffs' contentions, assert that we should affirm the summary judgments as the trial court erred in denying their motions to dismiss predicated on plaintiffs' failure to file timely their administrative charges with the EEOC.

We deal first with defendants' contention that their motions to dismiss should have been granted. It is clear that the timeliness of plaintiffs' administrative charges and their district court complaints must be measured from the time plaintiffs were advised they were to be terminated. *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). Plaintiffs were notified that they were to be terminated in November 1983 and thus the administrative charges were prima facie untimely under 29 U.S.C. §626(d) as they were filed in October 1985. Therefore, inasmuch as an individual must bring these charges as a prerequisite to a district court action, ordinarily these cases would be barred. Here, however, the judge denied defendants' motions to dismiss because of Allen-Sherman-Hoff's failure to post the notice required by 29 U.S.C. §627.

These rulings were correct. The time constraints of 29 U.S.C. §626(d) are a statute of limitations rather than a jurisdictional prerequisite to filing the charges and thus an individual's failure to file the administrative charges within the period specified in 29 U.S.C. §626(d) will not necessarily bar a subsequent district court action. *Meyer v. Riegel Prod. Corp.*, 720 F.2d 303, 306-07 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984). Further, as noted by the district judge, an employer's neglect to post the notice required by 29 U.S.C. §627 will toll the running of the period for filing the administrative charges, at least until the "aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the Age Discrimination in Employment Act." *Bonham v. Dresser Indus., Inc.*, 569 F.2d at 193. Here each plaintiff in response to defendant's motion to dismiss filed an affidavit stating that he was unaware of his legal rights under federal and state employment discrimination statutes including the ADEA while employed by Allen-Sherman-Hoff and that he first became aware of these rights on or about October 4, 1985 upon consultation with an attorney.[3]

We are satisfied that defendants' motions for summary judgments predicated on the two-year statute of limitations in 29 U.S.C. §255, incorporated by 29 U.S.C. §626(e)(1), should have been denied. It is, of course, clear that the running of the statute of limitations may be tolled by "equitable considerations." *See*

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3. In *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986), the court indicated that there would be no tolling if the employee had general knowledge of his right not to be discriminated against on account of age or the means of acquiring such knowledge. *Id.* at 952. From the employee's viewpoint this is a less generous basis for tolling than that articulated in *Bonham*. Of course, we use the *Bonham* test as it represents the law as determined by this Court. We understand plaintiffs' affidavits to mean that they were unaware of the anti-discrimination laws and procedures and not simply that they were unaware of their own possible bases for charges under the ADEA. Obviously, an employee with full knowledge of anti-discrimination laws and procedures including all information which would be given by a notice posted pursuant to 29 U.S.C. §627 would not be entitled to a tolling of any limitation period merely because the notice was not posted, as the employer's failure to post the notice would not have prejudiced the employee.

Kazanzas v. Walt Disney World Co., 704 F.2d 1527, 1529 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983). Even if we assume that the district judges had discretion in determining whether to find the statute was tolled, we are satisfied for the following reasons that it was an abuse of discretion to enter summary judgment for defendants.[4]

When defendants' motions for summary judgment were considered, the district court had denied their original motions to dismiss and thus was treating the administrative proceedings as timely. But plaintiffs, though represented by counsel and aware of their rights under the ADEA within the two-year period set forth in 29 U.S.C. §626(e)(1), were precluded from filing their district court actions until after they filed their charges of discrimination in October 1985 by 29 U.S.C. §626(d), which provides that no civil action under the ADEA may be commenced "until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." Thus, unless we hold that the statute of limitations was tolled, plaintiffs' putative actions, though not yet filed or barred were doomed when they filed their administrative charges.[5] Yet Allen-

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4. While the parties have stated that our standard of review is the same as the district court utilized initially, that is whether viewing the evidence and inferences most favorably to plaintiffs defendants are entitled to judgment as a matter of law (*See Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985)), this conventional formulation may be inadequate here as this case involves an equitable determination after the operative facts are established. Thus we have also considered this case under the abuse of discretion standard. *See E.E.O.C. v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 81 (3d Cir.), *cert. dismissed*, 469 U.S. 925 (1984).

5. Defendants contend that under 29 U.S.C. §633(b) the actions should not have been brought until the expiration of 60 days after the commencement of the Pennsylvania administrative proceedings and thus should be deemed to have been filed at the expiration of the 60-day period, rather than on December 9, 1985. We reject this contention because regardless of the propriety of their doing so, plaintiffs in fact brought their actions on December 9, 1985 and there is no indication in the record that defendants moved to dismiss the district court actions as premature even though they made reference to the requirements of 29 U.S.C. §633(b) in their district court briefs filed on the motions to dismiss. Perhaps there was no such motion because defendants expected that if they so moved the cases would be held "in

Sherman-Hoff must, as a matter of law, at least at this stage of the proceedings involving review of orders on pretrial motions, be held to have contributed to this situation by its failure to post the notices required by 29 U.S.C. §627, thereby delaying the filing of plaintiffs' administrative charges. Accordingly, plaintiffs should be permitted to prosecute their actions provided this can be equitably done taking into consideration defendants' rights to repose under the statute of limitations.

The statute of limitations is important to a defendant to protect it from the unfair surprise of a stale claim. *See Kreiger v. United States*, 539 F.2d 317, 322 (3d Cir. 1976). Under the unique facts here, it would do no violence to this policy to toll the statute as Allen-Sherman-Hoff, by reason of the service of the Notices of Charges of Discrimination in October 1985, knew of plaintiffs' claims before the two-year statute ran. Thus, we are satisfied that a weighing of the equitable considerations in these cases requires that the statute of limitations be tolled and plaintiffs' complaints be considered timely. Accordingly, the judges erred in granting defendants' motion for summary judgment.

We think it important to point out the limitations of our opinion. Our result is based on the coincidence of the circumstances that: (1) the district court did not err in denying defendants' original motions to dismiss; (2) the charges were filed promptly with the EEOC after plaintiffs retained counsel; (3) the charges were filed at a time when the 60-day deferral provisions of 29 U.S.C. §626(d) made it too late for plaintiffs properly to file their district court complaints within two years after the occurrence of the alleged unlawful action; and (4) the

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abeyance" until the 60 days ran. *See Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 764-65 (1979). In any event in the absence of such a motion we see no reason to consider the possibility of plaintiffs obtaining relief under Pennsylvania law. *See Slenkamp v. Borough of Brentwood*, 603 F.Supp. 1298, 1302-03 (W.D. Pa. 1985), *aff'd*, 826 F.2d 1057 (3d Cir. 1987). We further point out that Martin apparently brought this action before the expiration of the 60-day preclusion period in 29 U.S.C. §626(d)(1). Defendants, however, do not rely on this to uphold the result in the trial court and thus we do not consider the consequence of this seemingly premature filing.

defendants were aware of the charges within two years of the accrual of the plaintiffs' causes of action. Thus, we do not suggest that if plaintiffs had been aware of their potential claims beyond the period for filing timely EEOC charges, but early enough so that 60 days after filing the charges they could have brought these actions within the two-year limitations period, we would have reached the same result. To the contrary, it is difficult to perceive what equitable considerations in those circumstances could justify a tolling as defendants' failure to post the notices could not then be held to have required that the district court action be brought in an untimely fashion.

We further note that we do not suggest that our result would have been the same if Allen-Sherman-Hoff had not been aware of plaintiffs' claims within two years after plaintiffs were notified they were to be discharged. While in that circumstance the equities in favor of a plaintiff might be no less than those here, a court, aware of its obligation ordinarily to apply a statute of limitations (*see School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981)), might hold the action barred as the employer would have more of a basis to claim a right of repose than defendants here. Thus, we conceive that an individual might become aware of his rights under the ADEA too soon or too late to benefit by our result. Indeed, in our view this case falls within a narrow corridor through which plaintiffs may safely pass.

We also point out what we do not decide with respect to these particular cases. The matters are before us on plaintiffs' appeals from the granting of defendants' motions for summary judgment and, in addition, from the district court's denial of defendants' motions to dismiss which, as we have indicated, were treated as motions for summary judgment.[6] We are only holding that the original motions were properly denied and that the second motions should have been denied. Finally, in view of our result, we do not reach plaintiffs' contentions that the three-year statute of limitations is applicable in these cases.

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6. Defendants appropriately raised this issue without a cross-appeal. *See Lucas v. Gulf & W. Ind. Inc.*, 666 F.2d 800, 805 (3d Cir. 1981).

The orders for summary judgment will be reversed and the matters will be remanded to the trial court for further proceedings consistent with this opinion.[7]

A True Copy:

Teste:
Clerk of the United States Court of Appeals
for the Third Circuit

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7. It should not be inferred that we have implied any opinion as to the merits of this case.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. MARTIN	:	**CIVIL ACTION**
-v-	:	
ALLEN-SHERMAN-HOFF COMPANY	:	
and	:	
ECOLAIRE INCORPORATED	:	**NO. 85-7080**
WALTER J. SMALL	:	**CIVIL ACTION**
-v-	:	
ALLEN-SHERMAN-HOFF COMPANY	:	
and	:	
ECOLAIRE INCORPORATED	:	**NO. 85-7077**

MEMORANDUM

Lord, S.J. February 25, 1987

Plaintiffs in this consolidated action have sued their former employer, Allen-Sherman-Hoff Company ("ASH") and its parent corporation, Ecolaire Incorporated, under the Age Discrimination and Employment Act, 29 U.S.C. §621-634 ("ADEA"). Defendants move for summary judgment. Defendants contend that the instant action is barred by ADEA's two year statute of limitations. There is no dispute that the instant action was filed more than two years after the cause of action accrued. However, plaintiffs argue that the motion should be denied because the applicable statute of limitations is three years, or, in the alternative, because ASH's conduct justifies equitable tolling. I shall consider each claim seriatim.

A. The Applicable Statute of Limitations

ADEA contains two statutes of limitations through its incorporation of the statutes of limitations found in the Portal-to-Portal Act. Specifically, "willful" violations of ADEA are subject to a three year statute of limitations; all other violations are subject to a two year statute of limitations. 29 U.S.C. §626(e) (incorporating 29 U.S.C. §§255, 259).

The definition of "willfulness" for purposes of ADEA has recently been considered by the Supreme Court. In *Trans World Airlines v. Thurston*, 469 U.S. 111 (1985), the Court considered whether TWA's violation of ADEA was willful, entitling respondents to liquidated damages. Reviewing the legislative history, the Court found that Congress intended liquidated damages to be "punitive" in nature. The Court deemed "acceptable" the circuit court's definition that TWA's conduct was willful if TWA "knew or showed reckless disregard for . . . whether its conduct was prohibited by the ADEA." *Id.* at 126. The Court found that TWA's violation was not willful because it had adopted its policy only after conferring with its lawyers and the Union, in an attempt to comply with ADEA and the collective bargaining agreement. The record thus revealed that TWA "acted reasonably and in good faith" in attempting to determine whether its policy violated ADEA. *Id.* at 129.

In *Dreyer v. Arco Chemical Company*, 801 F.2d 651 (3d Cir. 1986), the court gave further content to the *Thurston* test. *Dreyer* emphasized that not all intentional violations of ADEA are willful violations, and that willful conduct is conduct that would justify an award of punitive damages in a tort case. *Dreyer, supra*, 801 F.2d at 657-58. Citing the *Restatement (Second) of Torts*, the Third Circuit held that willful conduct typically "involv[es] some element of outrage similar to that usually found in crime." *Id.* at 658.

Plaintiffs rely upon the testimony of defendants' in-house counsel, Brady, to establish "willfulness." Brady testified that the pre- and post-termination statistics on the age of employees in plaintiffs' department were the cause of some "concern." Brady decided to investigate the cause of plaintiffs' dismissals.

He spoke with the individuals who made the decisions to dismiss. Brady learned that Small was terminated because he was not effective in marketing ASH's products, and because he did not accept the use of computerized systems. Martin was terminated, in part, because another ASH employee was performing substantially the same job, had more experience, and was receiving a lower salary. Brady testified that after a thorough investigation he was convinced that age was not a factor in the decisions to lay off plaintiffs.

At oral argument, plaintiffs' counsel attempted to impugn Brady's credibility. However, nothing in the record provides reason to doubt Brady's testimony. Brady's testimony does not support plaintiffs' claim that their terminations were in willful violation of ADEA. His investigation did not reveal outrageous conduct "similar to that usually found in crime." Rather, it suggests that defendants "acted reasonably and in good faith in attempting to determine whether [plaintiffs' terminations] would violate the ADEA." *Thurston, supra*, 469 U.S. at 129. As plaintiffs have failed to raise a genuine issue of material fact on the question of willfulness, ADEA's two year statute of limitations is applicable.

B. Equitable Tolling

Plaintiffs claim that equitable tolling is justified because (1) defendants failed to post a notice required by ADEA and (2) defendants misrepresented the true reasons for plaintiffs' dismissal.

1. ADEA provides that "every employer . . . shall post . . . a notice to be prepared or approved by the [EEOC] setting forth information . . . appropriate to effectuate the purposes of this [Act]." 29 U.S.C. §627. In this circuit, "[f]ailure to post the required notice will toll the [period to file an administrative complaint with the EEOC], at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the Age Discrimination in Employment Act." *Bonham v. Dresser Industries, Inc.*, 569 F.2d 187, 193 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

However, plaintiff has not presented, and I have not found, authority for the proposition that failure to post the requisite notice tolls the statute of limitations for filing a civil suit. Both the Eleventh Circuit and the Eighth Circuit have stated that although failure to post the EEOC notice may toll the period to file an administrative complaint, "it will not normally toll the two year statute of limitations for bringing the action in court, which continues to run from the date of the alleged wrongful act." *See, e.g., DeBrunner v. Midway Equipment Company*, 803 F.2d 950, 952 n.5 (8th Cir. 1986); *McClinton v. Alabama By-Products Corporation*, 743 F.2d 1483, 1486 n.5 (11th Cir. 1984); *Kazanzas v. Walt Disney World Company*, 704 F.2d 1527, 1530 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983). I follow these courts and hold that ASH's failure to post the EEOC notice does not toll the two year civil action statute of limitations in this case.

2. Plaintiffs' final argument is that the statute of limitations should be tolled because ASH misrepresented to plaintiffs the real factors underlying their terminations. Plaintiffs claim that in November 1983 they were told that their terminations were a result of economic factors. At that time, Small suspected that age was a factor in his dismissal, but did not contact an attorney. In September, 1985, Small spoke with Hardy, another former employee of ASH. Hardy had been fired by defendants earlier in 1985, and had been advised to file a complaint alleging age discrimination. Hardy, aware of Small's age, and the age of others terminated at the same time as Small, suggested that Small was also a victim of age discrimination. Small then relayed this information to Martin. Until that time, Martin did not suspect that age was a factor in his termination. Shortly thereafter, Small and Martin initiated the instant action.

Plaintiffs correctly note that one of the principal situations where equitable tolling may be appropriate is where "the defendant has actively misled the plaintiff respecting the cause of action." *Meyer v. Riegel Products Corp.*, 720 F.2d 303, 307 (3d Cir. 1983) (quoting *School District of Allentown v. Marshall*, 657 F.2d 16, 20 (3d Cir. 1981)). However, each case plaintiff relies upon addresses the equitable tolling of a relatively brief

period to file an administrative complaint, rather than the longer period within which to file a civil action. *See Meyer*, *supra*, 720 F.2d at 306-09 (reversing district court's refusal to toll period to file administrative complaint); *Marshall*, *supra*, 657 F.2d at 16 (refusing to toll thirty day period to file administrative complaint); *Bonham*, *supra*, 596 F.2d at 193 (tolling period to file administrative complaint).

Moreover, *Meyer* is distinguishable from the instant case. In *Meyer*, plaintiff was told he was fired for economic reasons. Nevertheless, plaintiff suspected that age was a factor in his termination. Plaintiff consulted with an attorney, and was told that he could not make out a *prima facie* case of age discrimination. Months later, plaintiff learned of an "allleged[ly] surreptitious plan to replace plaintiff with a younger employee." *Meyer*, *supra*, 720 F.2d at 307. After receiving this new information, plaintiff's counsel initiated legal action. The court held that the facts that plaintiff suspected that he was a victim of age discrimination at the time of his termination, and conferred with an attorney shortly thereafter, did not preclude equitable tolling of the period to file an administrative complaint.

Meyer's claim "remained obscure," *Meyer*, *supra*, 720 F.2d at 309; until he learned a "new fact," namely, defendant's allegedly surreptitious hiring plan. In contrast, there is no allegation that either Small or Martin was unaware of any of the relevant facts at the time he was dismissed. That is, there is no allegation that defendants hid from plaintiffs the identity or ages of other persons fired at the time of plaintiffs' terminations, or that there was a "surreptitious plan" to replace plaintiffs with younger employees. There is no allegation that plaintiffs learned anything new about their terminations from Hardy. In short, there is no evidence that defendants concealed any facts which misled plaintiffs, or prevented plaintiffs from asserting their rights. For this reason, it would be inappropriate to invoke the doctrine of equitable tolling in this case.

CONCLUSION

For the foregoing reasons, defendants' motion for summary judgment will be granted. An appropriate order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WILLIAM F. MARTIN	:	**CIVIL ACTION**
v.	:	
ALLEN-SHERMAN-HOFF COMPANY and ECOLAIRE INCORPORATED	:	**NO. 85-7080**
WALTER J. SMALL	:	**CIVIL ACTION**
v.	:	
ALLEN-SHERMAN-HOFF COMPANY and ECOLAIRE INCORPORATED	:	**NO. 85-7077**

ORDER

AND NOW, this 25th day of February, 1987, it is ORDERED that defendants' motion for summary judgment is GRANTED. Judgment is entered in favor of the defendants and against the plaintiffs.

BY THE COURT:

Joseph S. Lord, III S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK R. CALLOWHILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE ALLEN-SHERMAN-HOFF COMPANY, INC. AND ECOLAIRE, INC.	:	**NO. 85-7081**

ORDER

AND NOW, this 15th day of December, defendants' motion for summary judgment is hereby granted and the complaint is dismissed upon a finding that the two-year statute of limitations asserted by defendants bars this action, there being no issue of "willfulness" sufficiently presented in the record to invoke the three-year limitations period, the cause of action having arisen prior to December 9, 1983 and the complaint having been filed on December 9, 1985, an elapsed period of more than two years but less than three years. The merits of the action are not ruled on.

BY THE COURT

_____

Edmund V. Ludwig, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

WALTER J. SMALL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE ALLEN-SHERMAN-HOFF COMPANY, INC., et al.	:	**NO. 85-7077**
	:	
WILLIAM F. MARTIN	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE ALLEN-SHERMAN-HOFF COMPANY, INC., et al.	:	**NO. 85-7080**

ORDER

AND NOW, this 14th day of April, 1986, it is hereby ORDERED that defendants' motions to dismiss are DENIED.

BY THE COURT:

_____

Joseph S. Lord, III S.J.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

FREDERICK R. CALLOWHILL	:	**CIVIL ACTION**
	:	
v.	:	
	:	
THE ALLEN-SHERMAN-HOFF COMPANY, INC., et al.	:	**NO. 85-7081**

ORDER

AND NOW, this 14th day of April, 1986, it is hereby ORDERED that defendants' motion to dismiss is DENIED.

BY THE COURT:

Joseph S. Lord, III S.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
November 4, 1987

TO: Gary C. Bender, Esq.
Ralph B. D'Iorio, Esq.
Judith E. Harris, Esq.

NOTICE OF JUDGMENT

This Court's opinion was filed and Judgment was entered today in case Nos. 87-1034, 87-1169 & 87-1170 and copies are enclosed herewith.

FILED
FEB 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1286

In The

Supreme Court of the United States

October Term, 1987

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,
Petitioners,

v.

FREDERICK R. CALLOWHILL,
Respondent,

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,
Petitioners,

v.

WALTER J. SMALL,
Respondent,

THE ALLEN-SHERMAN-HOFF COMPANY, INC., and ECOLAIRE, INC.,
Petitioners,

v.

WILLIAM F. MARTIN,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

STEVEN E. COMBS, ESQUIRE*
GARY C. BENDER, ESQUIRE
Attorneys for Respondents

Of Counsel:
CRAMP, D'IORIO, McCONCHIE & FORBES, P.C.
215 N. Olive Street
P.O. Box 568
Media, PA 19063
(215) 565-1700
**Attorney of Record*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

I. WHETHER THE THIRD CIRCUIT COURT OF APPEALS TOLLED THE STATUTE OF LIMITATIONS FOR FILING A CIVIL ACTION IN THESE CASES SOLELY BECAUSE THE EMPLOYER FAILED TO POST THE NOTICE REQUIRED BY 29 U.S.C., § 627?

II. WHETHER THE THIRD CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE ADMINISTRATIVE STATUTE OF LIMITATIONS UNDER 29 U.S.C., SEC. 626(d) WAS TOLLED WHERE THE EMPLOYER FAILED TO POST THE REQUIRED NOTICE UNDER 29 U.S.C., § 627 EVEN THOUGH THE EMPLOYER POSTED A PENNSYLVANIA HUMAN RELATIONS COMMISSION NOTICE?

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II. WHETHER THE THIRD CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE ADMINISTRATIVE STATUTE OF LIMITATIONS UNDER 29 U.S.C. § 626(d) WAS TOLLED WHERE THE EMPLOYER FAILED TO POST THE REQUIRED NOTICE UNDER 29 U.S.C. § 627 EVEN THOUGH THE EMPLOYER POSTED A PENNSYLVANIA HUMAN RELATIONS COMMISSION NOTICE? 2

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REASONS FOR DENYING WRIT

I. WHETHER THE THIRD CIRCUIT COURT OF APPEALS TOLLED THE STATUTE OF LIMITATIONS FOR FILING A CIVIL ACTION IN THESE CASES SOLELY BECAUSE THE EMPLOYER FAILED TO POST THE NOTICE REQUIRED BY 29 U.S.C., § 627?

The Petitioner, Allen-Sherman-Hoff implies in its petition for a writ of certiorari that the reason the Third Circuit Court of Appeals tolled the statute of limitations for filing a civil action in these cases was *solely* because the employer failed to post the notice required by 29 U.S.C., § 627. The question presented by the Petitioner is entirely misleading and completely misstates the reasons why the Appellate Court tolled the statute of limitations in these cases. In tolling the statute of limitations, the Third Circuit in its opinion examined a number of factors which were specifically unique to the cases in question. The specific facts and circumstances which the Court weighed in making its equitable determination are clearly set forth below in the Court's Opinion:

> "We think it important to point out the limitations of our opinion. Our result is based on the coincidence of the circumstances that: (1) the district court did not err in denying defendants' original motions to dismiss; (2) the charges were filed promptly with the EEOC after plaintiffs retained counsel; (3) the charges were filed at a time when the 60-day deferral provisions of 29 U.S.C., § 626(d) made it too late for plaintiffs properly to file their district court complaints within two years after the occurrence of the alleged unlawful action; and (4) the defendants were aware of the charges within two years of the accrual of the plaintiffs' causes of action." *Callowhill v. Allen-Sherman-Hoff Co., Inc.*, 832 F.2d 269, 274 (3d Cir. 1987) (A-12)

The Third Circuit's opinion clearly indicates that it was the combination of all of these factors which led to their result rather than merely the failure of the employer to post the required notice under 29 U.S.C., § 627 as Petitioner Allen-Sherman-Hoff alleged in its petition for a writ of certiorari. Whether to toll a statutory period is determined on a case-by-case basis, depending on the equities of the situation. *McClinton v. Alabama By-Products Corp.*, 743 F.2d 1483, 1485 (11th Cir. 1984). The Third Circuit opinion in our case examined all of the facts peculiar and unique to the present cases and after weighing the equities involved, held that the statute of limitations should be tolled and the plaintiffs' complaints be considered timely. Thus, there is no intercircuit conflict in this case as alleged by Petitioner Allen-Sherman-Hoff since the Third Circuit did not toll the statute of limitations *solely* because the employer failed to post the notice required by 29 U.S.C., § 627.

II. WHETHER THE THIRD CIRCUIT COURT OF APPEALS ERRED IN FINDING THAT THE ADMINISTRATIVE STATUTE OF LIMITATIONS UNDER 29 U.S.C., § 626(d) WAS TOLLED WHERE THE EMPLOYER FAILED TO POST THE REQUIRED NOTICE UNDER 29 U.S.C., § 627 EVEN THOUGH THE EMPLOYER POSTED A PENNSYLVANIA HUMAN RELATIONS COMMISSION NOTICE?

In an earlier stage in the procedural history of these cases, Petitioner-Defendant Allen-Sherman-Hoff filed a motion to dismiss the cases based upon the plaintiffs' failure to timely file their administrative charges with the EEOC under 29 U.S.C., § 626(d). The district court denied defendants' motion to dismiss because of Allen-Sher-

man-Hoff's failure to post the notice required by 29 U.S.C., § 627. In denying the motions to dismiss, the district court relied on *Bonham v. Dresser Industries Inc.*, 569 F.2d 187 (3d Cir. 1977), Cert denied, 439 U.S. 821 (1978). The *Bonham* case held that the employer's failure to post the notice required by 29 U.S.C. § 627 will result in tolling the statute of limitations for filing an administrative claim with the EEOC, at least until such time as the aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the ADEA. 569 F.2d at 193. As the Third Circuit opinion noted, the facts in our cases were very similar to *Bonham* in that each plaintiff filed an affidavit stating he was unaware of his legal rights under federal and state employment discrimination statutes while employed by Allen-Sherman-Hoff and that he first became aware of these rights on or about October 4, 1985 upon consultation with an attorney. *Callowhill v. Allen-Sherman-Hoff Co., Inc.*, 832 F.2d 269, 272 (3d Cir. 1987) (A-9).

Petitioner Allen-Sherman-Hoff now asserts that by posting the Pennsylvania Human Relations Commission notice they gave "constructive notice" to each of the plaintiffs with respect to their legal rights under the federal statute (ADEA) as set forth in *DeBrunner v. Midway Equipment Co.*, 803 F.2d 950 (8th Cir. 1986). Petitioner Allen-Sherman-Hoff goes on to say that by posting the Pennsylvania Human Relations Commission notice, they gave plaintiffs the means of acquiring knowledge with respect to their federal rights under the ADEA. This allegation by Allen-Sherman-Hoff is a factual conclusion which had been decided in favor of the plaintiffs by the

Third Circuit (A-9, footnote 3). Moreover, the facts of the *DeBrunner* case are inapplicable to the matter at hand since in *DeBrunner*, the individual had actually sought advice from the EEOC prior to her discharge. In the present cases, the plaintiffs' affidavits indicated that they were totally unaware of any anti-discrimination laws and procedures (See A-9, footnote 3). In fact, the Third Circuit stated that if the employee did have full knowledge of the anti-discrimination laws and procedures, then they would not be entitled to a tolling of any limitation period merely because the notice was not posted, as the employer's failure to post the notice would not have prejudiced the employee (See A-9, footnote 3). This is in accord with the cases cited by the petitioner (*Kazanzas v. Walt Disney World Company*, 704 F.2d 1527 (11th Cir.), cert. denied, 464 U.S. 982 (1983)) which indicates that you must examine each case on its particular facts to determine if tolling is warranted.

Also, Respondents dispute the Petitioner Allen-Sherman-Hoff's factual allegations that by posting the Pennsylvania Human Relations Commission (PHRC) notice, the plaintiffs had "constructive notice" and thus should be charged with actual knowledge of their rights under the ADEA or the means of acquiring such knowledge as set forth in *DeBrunner*. First of all, there are substantial differences between the PHRC notice and the EEOC notice, not the least of which is that the PHRC notice extends protection to those between the ages of forty and sixty-two (as opposed to age 70 for the EEOC notice) and provides for completely different time periods and locations for filing a complaint. The PHRC complaint must be filed within ninety days and thus, an employee

who is beyond the ninety days may not contact the PHRC because he is beyond the filing period even though he could timely file with the EEOC since their filing period in a deferral state such as Pennsylvania is three hundred days. 29 U.S.C. § 626(d) (A-5). It is interesting to note that one of the plaintiffs, namely, William Martin, was age sixty-three at the time of his firing and thus he could certainly conclude that he had no cause of action as set forth in the PHRC notice since the age limit is sixty-two. Thus, Petitioner Allen-Sherman-Hoff's assertion that the posting of the PHRC notice was the equivalent of the EEOC notice with respect to advising the plaintiffs of their rights under the federal statute (ADEA) is entirely without merit.

Furthermore, if this Court would have to examine each and every notice that an employer may post to determine if that particular notice was sufficient under the current guidelines and law of the EEOC in order to advise the employees of their rights under the ADEA then the Courts would be flooded with cases each dependent upon the particular wording of the notice in question. For this reason 29 U.S.C., § 627 specifically states that the notice must be prepared or approved by the EEOC setting forth information as the Commission deems appropriate to effectuate the purposes of the Act. Also, this may be one reason why both the District Court and the Third Circuit held in these cases that the posting of the PHRC notice did not comply with 29 U.S.C., § 627 and ultimately tolled the *administrative* statute of limitations for filing a charge with the EEOC.

Thus, if the Court were to grant certiorari to determine whether a particular notice was sufficient in order to

comply with the EEOC regulations, then this would cause every litigant to seek review of their particular notice and result in numerous fact-sensitive decisions. As already stated, the issue of tolling the administrative statute of limitations was decided based upon the *Bonham* decision and the particular facts set forth in these cases. The Supreme Court has made it clear that it does not grant certiorari to review facts. *Texas v. Mead*, 465 U.S. 1041 (1984). In addition, certiorari should not be granted except in cases involving principles, the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Court of Appeals. *Rice v. Sioux City Memorial Parks Cemetary, Iowa*, 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955). In these particular cases, there is no conflict between the circuits because any differences reflect a difference in the assessment of facts and not a "real and embarrassing conflict of opinion and authority between the Court of Appeals that is a matter of public importance." *Rice*, supra. The Third Circuit opinion clearly indicates it is dependent upon the unique and particular set of facts and circumstances presented in these cases (A-10, 11, 12).

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CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

/s/ Steven E. Combs
STEVEN E. COMBS, ESQUIRE
GARY C. BENDER, ESQUIRE
Attorneys for Respondents
Frederick R. Callowhill,
Walter J. Small and
William F. Martin

DATED: February 27, 1988

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 87-1034, 87-1169 and 87-1170

FREDERICK R. CALLOWHILL,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INC.

WALTER J. SMALL,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INCORPORATED

WILLIAM F. MARTIN,

Appellant

v.

THE ALLEN-SHERMAN-HOFF COMPANY, INC.
and ECOLAIRE, INCORPORATED

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civ. Nos. 85-7081, 85-7077 and 85-7080)

Argued October 1, 1987

BEFORE: SEITZ, GREENBERG and HUNTER,
Circuit Judges

(Filed November 4, 1987)

RALPH B. D'ORIO
GARY C. BENDER (Argued)
CRAMP, D'IORIO, McCONCHIE
& FORBES
215 N. Olive Street
P.O. Box 568
Media, Pa. 19063

Attorneys for Appellants

JUDITH E. HARRIS (Argued)
HARRIS & KAHN
1600 Market Street
Suite 1416
Philadelphia, Pa. 19103

Attorneys for Allen-Sherman-Hoff Company, Inc. and Ecolaire, Incorporated

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OPINION OF THE COURT

GREENBERG, *Circuit Judge.*

Plaintiffs Frederick R. Callowhill, Walter J. Small, and William F. Martin appeal from summary judgments entered in the district court in favor of defendants Allen-Sherman-Hoff Company, Inc. and Ecolaire, Inc., dismissing their separate complaints under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634. The grounds for granting the motions were that the cases are barred by the statute of limitations under the ADEA which requires that cases be filed within two years of the

accrual of a cause of action, or three years if the violations are willful. 29 U.S.C. § 626(e)(1); 29 U.S.C. § 255 (a). Plaintiffs alleged that they were discharged by their employer, Allen-Sherman-Hoff, because of age. Ecolaire was joined as a defendant because Allen-Sherman-Hoff is one of its divisions. It is undisputed that each plaintiff was advised on or about November 18, 1983 that his last day of work would be December 9, 1983 and that none worked for Allen-Sherman-Hoff after the latter date.

We separately set forth additional material facts developed in each case on the motions for summary judgment. Callowhill, who was born November 7, 1921, was employed by Allen-Sherman-Hoff on June 8, 1979 as a manager of the International Operations Group responsible for all sales activities in the United States and Canada. He was told that he was being discharged because of a departmental reorganization. While Callowhill had "suspicions" that his discharge was because of age, it was not until almost two years later, when he talked to other former employees of Allen-Sherman-Hoff, that he concluded the corporation had discriminated against older employees. Accordingly, he consulted an attorney on or about October 4, 1985 and on October 8, 1985 filed a Charge of Discrimination with the Equal Employment Opportunity Commission (EEOC) in Philadelphia. Notice of the charge was served on Allen-Sherman-Hoff on October 30, 1985 and on December 9, 1985 Callowhill brought this action in the district court.

Small, who was born on February 9, 1922, joined Allen-Sherman-Hoff in January 1948 and in early January 1974 became manager of its renewal parts department. The com-

pany advised him that his discharge was necessary because of economic reasons. While Small subsequently wondered whether the introduction of a new pension plan made it advantageous for Allen-Sherman-Hoff to discharge him because of his age, he did not consult an attorney until after he was told in September 1985 that older employees had been terminated by Allen-Sherman-Hoff even though there was work for them. He consulted an attorney on or about October 4, 1984 and on October 11, 1985 filed a Charge of Discrimination with the EEOC. Notice of the charge was served on Allen-Sherman-Hoff on October 31, 1985 and on December 9, 1985 Small brought this action in the district court.

Martin, who was born on June 14, 1920, was hired by a predecessor corporation to Allen-Sherman-Hoff in 1941 as a payroll clerk. He began working for Allen-Sherman-Hoff in 1976 as a sales correspondent and in 1981 was given the added responsibility of being a pricing specialist. Martin was told he was being discharged because of a departmental reorganization and economic conditions. It was not until he had a discussion with Small in September 1985 that he considered his age might have been a factor in the decision to terminate him. On or about October 4, 1985 he consulted with counsel and he filed a Charge of Discrimination with the EEOC on October 15, 1985. Notice of the charge was served on Allen-Sherman-Hoff on October 30, 1985 and December 9, 1985 Martin brought this action in the district court.

It is undisputed from the records before us that Allen-Sherman-Hoff never posted the notice required by 29 U.S.C. § 627 to advise its employees of their rights under

the ADEA. It appears, however, though plaintiffs claim not to have seen them, that it posted notices from the Pennsylvania Human Relations Commission dealing with employees' rights under Pennsylvania anti-discrimination laws and that at about the time plaintiffs commenced their actions in the district court, they also filed complaints with the Pennsylvania Commission.

Prior to moving for summary judgment, defendants filed, in all three cases, motions to dismiss the complaints for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Defendants asserted that the actions were barred by plaintiff's failure to file timely administrative charges with the EEOC under 29 U.S.C. § 626(d) which requires, as a prerequisite to a district action, that administrative charges be filed within 180 days after the occurrence of an alleged unlawful practice. In a state such as Pennsylvania which has an agency performing functions similar to those of the EEOC, the time for filing is extended to 300 days or to a period within 30 days of receipt by the individual of notice of termination of proceedings under state law, whichever is earlier. 29 U.S.C. § 626(d). In view of the circumstance that affidavits submitted by the parties on these initial motions were considered by the district court the Rule 12(b)(6) motions were treated as motions for summary judgment. Nevertheless we will continue to refer to them as motions to dismiss so as to distinguish them from the later motions.

The motions to dismiss were argued simultaneously before the district court which denied them on the authority of our opinion in *Bonham v. Dresser Indus., Inc.*, 569 F.2d 187 (3d Cir. 1977), *cert. denied*, 439 U.S. 821 (1978).

The *Bonham* case held that the employer's failure to post the notice required by 29 U.S.C. § 627 will result in tolling the running of the limitations period in the EEOC proceedings, at least until such time as the aggrieved person seeks out an attorney or acquires actual notice of his rights under the ADEA, 569 F.2d at 193.

Subsequent to the completion of discovery, defendants moved for summary judgment. In *Callowhill* they alleged that the action was barred by the two-year statute of limitations in 29 U.S.C. § 626(e)(1) and 29 U.S.C. § 255(a) and that the evidence in the record, as a matter of law, could not support a charge of age discrimination. In *Small* and *Martin* the motions for summary judgment were based solely on the statute of limitations.[1] In *Callowhill* the district judge, in an oral opinion, ruled that the evidence was insufficient to support a finding of willfulness and thus the two-year statute of limitations applied. The judge then held that the claim was untimely and, accordingly, he granted summary judgment and dismissed the action. He indicated, however, that he was not "prepared to rule on this record that there is no issue of age discrimination, or to grant summary judgment on that basis." On December 15, 1986, the judge entered an order reflecting this decision.

In the *Small* and *Martin* cases a different judge filed a single written opinion on defendants' motions.[2] He held

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1. Defendants also unsuccessfully renewed their motions to dismiss.

2. *The judge* in the *Small* and *Martin* cases was the same judge who denied defendants' three motions to dismiss.

that plaintiffs had failed to raise a genuine issue of material fact with respect to Allen-Sherman-Hoff's alleged willful statutory violation of the ADEA and, as a result, the two-year statute of limitations applied. The judge then held that notwithstanding Allen-Sherman-Hoff's failure to post the required notice of employee's rights under 29 U.S.C. § 627, the two-year statute of limitations for the court action, as distinguished from the shorter administrative statute of limitations, would not be tolled nor would it be tolled because of Allen-Sherman-Hoff's alleged misrepresentation as to why plaintiffs were discharged. On February 25, 1987, the judge entered an order reflecting this decision. Small and Martin appealed from this order and Callowhill appealed from the order of December 15, 1986.

Plaintiffs contend that the two-year statute of limitations should be tolled by reason of the failure of Allen-Sherman-Hoff to post the notice required by 29 U.S.C. § 627. They further assert that they are entitled to the tolling inasmuch as they were barred by 29 U.S.C. § 626(d) from filing their district court complaints until 60 days after they filed their administrative charges with the EEOC and thus could not bring their district court actions within the two years allowed. Alternatively, plaintiffs argue that the district court erred in finding as a matter of law that Allen-Sherman-Hoff's conduct could not be a willful violation of the ADEA. Defendants, in addition to controverting plaintiffs' contentions, assert that we should affirm the summary judgments as the trial court erred in denying their motions to dismiss predicated on plaintiffs' failure to file timely their administrative charges with the EEOC.

We deal first with defendants' contention that their motions to dismiss should have been granted. It is clear that the timeliness of plaintiffs' administrative charges and their district court complaints must be measured from the time plaintiffs were advised they were to be terminated. *Delaware State College v. Ricks*, 449 U.S. 250, 259 (1980). Plaintiffs were notified that they were to be terminated in November 1983 and thus the administrative charges were prima facie untimely under 29 U.S.C. § 626 (d) as they were filed in October 1985. Therefore, inasmuch as an individual must bring these charges as a prerequisite to a district court action, ordinarily these cases would be barred. Here, however, the judge denied defendants' motions to dismiss because of Allen-Sherman-Hoff's failure to post the notice required by 29 U.S.C. § 627.

These rulings were correct. The time constraints of 29 U.S.C. § 626(d) are a statute of limitations rather than a jurisdictional prerequisite to filing the charges and thus an individual's failure to file the administrative charges within the period specified in 29 U.S.C. § 626(d) will not necessarily bar a subsequent district court action. *Meyer v. Riegel Prod. Corp.*, 720 F.2d 303, 306-07 (3d Cir. 1983), *cert. dismissed*, 465 U.S. 1091 (1984). Further, as noted by the district judge, an employer's neglect to post the notice required by 29 U.S.C. § 627 will toll the running of the period for filing the administrative charges, at least until the "aggrieved person seeks out an attorney or acquires actual knowledge of his rights under the Age Discrimination in Employment Act." *Bonham v. Dresser Indus., Inc.*, 569 F.2d at 193. Here each plaintiff in response to defendant's motion to dismiss filed an affi-

davit stating that he was unaware of his legal rights under federal and state employment discrimination statutes including the ADEA while employed by Allen-Sherman-Hoff and that he first became aware of these rights on or about October 4, 1985 upon consultation with an attorney.[3]

We are satisfied that defendants' motions for summary judgments predicated on the two-year statute of limitations in 29 U.S.C. § 255, incorporated by 29 U.S.C. § 626(e)(1), should have been denied. It is, of course, clear that the running of the statute of limitations may be tolled by "equitable considerations." *See Kazanzas v. Walt Disney World Co.*, 704 F.2d 1527, 1529 (11th Cir.), *cert. denied*, 464 U.S. 982 (1983). Even if we assume that the district judges had discretion in determining whether to find the statute was tolled, we are satisfied for the

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3. In *DeBrunner v. Midway Equip. Co.*, 803 F.2d 950 (8th Cir. 1986), the court indicated that there would be no tolling if the employee had general knowledge of his right not to be discriminated against on account of age or the means of acquiring such knowledge. *Id.* at 952. From the employee's viewpoint this is a less generous basis for tolling than that articulated in *Bonham*. Of course, we use the *Bonham* test as it represents the law as determined by this Court. We understand plaintiffs' affidavits to mean that they were unaware of the anti-discrimination laws and procedures and not simply that they were unaware of their own possible bases for charges under the ADEA. Obviously, an employee with full knowledge of anti-discrimination laws and procedures including all information which would be given by a notice posted pursuant to 29 U.S.C. § 627 would not be entitled to a tolling of any limitation period merely because the notice was not posted, as the employer's failure to post the notice would not have prejudiced the employee.

following reasons that it was an abuse of discretion to enter summary judgment for defendants.[4]

When defendants' motions for summary judgment were considered, the district court had denied their original motions to dismiss and thus was treating the administrative proceedings as timely. But plaintiffs, though represented by counsel and aware of their rights under the ADEA within the two-year period set forth in 29 U.S.C. § 626(e)(1), were precluded from filing their district court actions until after they filed their charges of discrimination in October 1985 by 29 U.S.C. § 626(d), which provides that no civil action under the ADEA may be commenced "until 60 days after a charge alleging unlawful discrimination has been filed with the [EEOC]." Thus, unless we hold that the statute of limitations was tolled, plaintiffs' putative actions, though not yet filed or barred were doomed when they filed their administrative charges.[5] Yet Allen-Sherman-Hoff must, as a mat-

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4. While the parties have stated that our standard of review is the same as the district court utilized initially, that is whether viewing the evidence and inferences most favorably to plaintiffs defendants are entitled to judgment as a matter of law (*See Gans v. Mundy*, 762 F.2d 338, 340 (3d Cir.), *cert. denied*, 474 U.S. 1010 (1985)), this conventional formulation may be inadequate here as this case involves an equitable determination after the operative facts are established. Thus we have also considered this case under the abuse of discretion standard. *See E.E.O.C. v. Great Atl. & Pac. Tea Co.*, 735 F.2d 69, 81 (3d Cir.), *cert. dismissed*, 469 U.S. 925 (1984).

5. Defendants contend that under 29 U.S.C. § 633(b) the actions should not have been brought until the expiration of 60 days after the commencement of the Pennsylvania administrative proceedings and thus should be deemed to have been

(Continued on following page)

ter of law, at least at this stage of the proceedings involving review of orders on pretrial motions, be held to have contributed to this situation by its failure to post the notices required by 29 U.S.C. § 627, thereby delaying the filing of plaintiffs' administrative charges. Accordingly, plaintiffs should be permitted to prosecute their actions provided this can be equitably done taking into consideration defendants' rights to repose under the statute of limitations.

The statute of limitations is important to a defendant to protect it from the unfair surprise of a stale claim. *See Kreiger v. United States,* 539 F.2d 317, 322 (3d Cir. 1976). Under the unique facts here, it would no do violence to this policy to toll the statute as Allen-Sherman-Hoff, by reason of the service of the Notices of Charges of Discrimination in October 1985, knew of plaintiffs'

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filed at the expiration of the 60-day period, rather than on December 9, 1985. We reject this contention because regardless of the propriety of their doing so, plaintiffs in fact brought their actions on December 9, 1985 and there is no indication in the record that defendants moved to dismiss the district court actions as premature even though they made reference to the requirements of 29 U.S.C. § 633(b) in their district court briefs filed on the motions to dismiss. Perhaps there was no such motion because defendants expected that if they so moved the cases would be held "in abeyance" until the 60 days ran. *See Oscar Mayer & Co. v. Evans,* 441 U.S. 750, 764-65 (1979). In any event in the absence of such a motion we see no reason to consider the possibility of plaintiffs obtaining relief under Pennsylvania law. *See Slenkamp v. Borough of Brentwood,* 603 F.Supp. 1298, 1302-03 (W.D. Pa. 1985), *aff'd,* 826 F.2d 1057 (3d Cir. 1987). We further point out that Martin apparently brought this action before the expiration of the 60-day preclusion period in 29 U.S.C. § 626(d)(1). Defendants, however, do not rely on this to uphold the result in the trial court and thus we do not consider the consequence of this seemingly premature filing.

claims before the two-year statute ran. Thus, we are satisfied that a weighing of the equitable considerations in these cases requires that the statute of limitations be tolled and plaintiffs' complaints be considered timely. Accordingly, the judges erred in granting defendants' motion for summary judgment.

We think it important to point out the limitations of our opinion. Our result is based on the coincidence of the circumstances that: (1) the district court did not err in denying defendants' original motions to dismiss; (2) the charges were filed promptly with the EEOC after plaintiffs retained counsel; (3) the charges were filed at a time when the 60-day deferral provisions of 29 U.S.C. § 626(d) made it too late for plaintiffs properly to file their district court complaints within two years after the occurrence of the alleged unlawful action; and (4) the defendants were aware of the charges within two years of the accrual of the plaintiffs' causes of action. Thus, we do not suggest that if plaintiffs had been aware of their potential claims beyond the period for filing timely EEOC charges, but early enough so that 60 days after filing the charges they could have brought these actions within the two-year limitations period, we would have reached the same result. To the contrary, it is difficult to perceive what equitable considerations in those circumstances could justify a tolling as defendants' failure to post the notices could not then be held to have required that the district court action be brought in an untimely fashion.

We further note that we do not suggest that our result would have been the same if Allen-Sherman-Hoff had not been aware of plaintiffs' claims within two years

after plaintiffs were notified they were to be discharged. While in that circumstance the equities in favor of a plaintiff might be no less than those here, a court, aware of its obligation ordinarily to apply a statute of limitations (*see School Dist. of Allentown v. Marshall*, 657 F.2d 16 (3d Cir. 1981)), might hold the action barred as the employer would have more of a basis to claim a right of repose than defendants here. Thus, we conceive that an individual might become aware of his rights under the ADEA too soon or too late to benefit by our result. Indeed, in our view this case falls within a narrow corridor through which plaintiffs may safely pass.

We also point out we do not decide with respect to these particular cases. The matters are before us on plaintiffs' appeals from the granting of defendants' motions for summary judgment and, in addition, from the district court's denial of defendants' motions to dismiss which, as we have indicated, were treated as motions for summary judgment.[6] We are only holding that the original motions were properly denied and that the second motions should have been denied. Finally, in view of our result, we do not reach plaintiffs' contentions that the three-year statute of limitations is applicable in these cases.

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6. Defendants appropriately raised this issue without a cross-appeal. *See Lucas v. Gulf & W. Ind. Inc.*, 666 F.2d 800, 805 (3d Cir. 1981).

The orders for summary judgment will be reversed and the matters will be remanded to the trial court for further proceedings consistent with this opinion.[7]

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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7. It should not be inferred that we have implied any opinion as to the merits of this case.